STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 23, 2006
v	No. 258281 Wayne Circuit Court
EDWARD ALEXANDER MOTLEY, Defendant-Appellee.	LC No. 04-003587

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

The prosecutor appeals as of right from the trial court's order overturning a jury verdict, granting a directed verdict in defendant's favor and dismissing a charge of criminal sexual conduct in the first degree against defendant. We reverse the trial court's order granting a directed verdict in defendant's favor and remand for entry of an order reinstating the jury's verdict.

I. Basic Facts And Procedure

Defendant was charged with four counts of criminal sexual conduct in the second degree, MCL 750.520c(1)(a), in addition to the single count for which he was convicted. The complainant in each instance was defendant's son. The prosecutor's theory of the case was that complainant's mother, wishing for a good relationship between complainant and defendant, allowed complainant extensive visits while defendant lived with his own mother, during which defendant repeatedly assaulted the boy, then 11 years old.

The jury acquitted defendant of all the lesser counts but convicted him of the single count. In a post-trial motion, the trial court ruled that the evidence was insufficient to support that verdict, and so directed a verdict of acquittal. This appeal followed.

II. Analysis

This Court reviews de novo a trial court's decision on a motion for a directed verdict. See *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). In assessing a motion for a directed verdict of an acquittal, a trial court must consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the

crime were proved beyond a reasonable doubt. *People v Riley*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).

This case turns on the issue of whether sufficient evidence exists to support the conclusion that sexual penetration had taken place. "Sexual penetration" is defined to include "any . . . intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of another person's body . . . ." MCL 750.520a(o).

Defendant cites the trial transcript to support the claim that no penetration took place. On direct examination, the alleged victim stated:

> *Q*. So you said that your father was sitting down on the couch and you were laying down on your stomach; is that right?
>
> *A*. Yes.
>
> *Q*. Okay. Do you remember what you were watching?
>
> *A*. No.
>
> *Q*. All right. So what happened that you didn't like? Tell us about that.
>
> *A*. He put his finger in my behind.
>
> *Q*. Okay. Did you have clothes on?
>
> *A*. Yes.
>
> *Q*. Do you remember what type of clothes you had on?
>
> *A*. No.
>
> *Q*. Okay. Did your father have clothes on?
>
> *A*. Yes.
>
> *Q*. When he did that, how did that feel?
>
> *A*. I was scared.
>
> *Q*. Okay. When you say that he put his finger in your behind, physically how did that feel, if you remember?
>
> *A*. It just felt like a press.
>
> *Q*. I'm sorry?
>
> *A*. Just like a press.

Defendant argues that the buttocks is not equivalent to the "anal opening" defined by statute. Defendant further claims that the child was not penetrated because of the presence of clothing. We find both assertions to be without merit.

Considering the testimony in a light most favorable to the prosecution, the trial court should have concluded that defendant's finger – along with the clothing – entered the alleged victim's buttocks. In *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995), this Court found that a father's digital penetration of his daughter's vagina, even if covered by her underwear, was sufficient to constitute penetration. Similarly, in this case, defendant's claim that his son's clothing formed some barrier to penetration fails.

Further, we conclude that once defendant's finger penetrated the alleged victim's buttocks, sexual penetration occurred. Michigan's criminal sexual conduct statutes define sexual penetration as well as sexual contact. MCL 750.520a reads, in part:

> (n) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:
>
> (i) Revenge.
>
> (ii) To inflict humiliation.
>
> (iii) Out of anger.
>
> (o) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

For defendant's theory to be valid, his actions would have to fall somewhere between "contact" and "penetration" – thus fitting neither definition and, consequently, not proscribed under statute. We do not read "anal opening" under sexual penetration to be limited to the anal canal. Rather, "anal opening" includes the crease of the buttocks immediately next to the anus itself. See *People v Peterson*, 450 Mich 349, 354; 537 NW2d 857 (1995), in which the facts of the case distinguish anal canal from anal opening.

Moreover, on cross examination, the following exchange took place between defense counsel and the alleged victim:

> *Q*. Now that month in July, July or August because it wasn't June, July or August you said that (defendant) rubbed your butt?
>
> *A*. No.
>
> *Q*. What did he do?

A. Put my – put his finger in it.

Q. Oh, I'm sorry. He put his finger in your butt?

A. Yes.

The alleged victim's testimony, as referenced in both places above, occurs on different days of the trial and on direct as well as cross examination. It is nevertheless consistent with regard to describing defendant's actions. Specifically, the alleged victim uses or adopts the word "in" to describe defendant's digital penetration of his anal opening. The 11-year-old boy's testimony does not use statutory terms, but: "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). We conclude, then, that "a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt," *Riley*, *supra*, i.e., that defendant's action met the statutory definition of sexual penetration.

Therefore, we reverse the trial court's order granting a directed verdict in defendant's favor and remand for entry of an order reinstating the jury's verdict with regard to first degree criminal sexual conduct. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra